

**United States Department of Labor
Employees' Compensation Appeals Board**

E.O., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Albuquerque, NM, Employer**

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**Docket No. 20-1411
Issued: April 8, 2021**

Appearances:

Janette Ortiz, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 20, 2020 appellant, through her representative, filed a timely appeal from a June 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 17, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$77,651.90, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2003 through December 1, 2017, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 22, 1994 appellant then a 53-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on even date she tripped on an oximeter cord and fell to the floor sustaining multiple injuries while in the performance of duty. OWCP accepted her claim for contusion of the left hand, buttock, and right shoulder and expanded the acceptance of her claim to include contusion of the lumbar back, displacement of lumbar intervertebral disc without myelopathy at L4-5, and herniated disc herniated nucleus pulposus L4-5.⁴ Appellant did not immediately stop work, but returned to a limited-duty position on June 12, 1995. OWCP placed her on the periodic rolls on June 13, 1996 and paid pursuant to a wage-earning capacity determination from June 16, 2002 through January 30, 2021.

On January 12, 2018 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA.

OWCP received a completed FERS/SSA dual benefits calculation form from SSA dated February 23, 2018 wherein SSA advised that, effective November 2003, appellant reached retirement age and became eligible for SSA age-related retirement benefits. It noted that since appellant's retirement coverage was under FERS, her compensation benefits must be offset by any part of her SSA benefit that was calculated by using her federal employment earnings. SSA calculated SSA age-related retirement benefit rates with FERS offset and without a FERS offset

⁴ On August 28, 1995 OWCP rescinded the acceptance letter of August 8, 1995. It indicated that the accepted conditions were contused left hand, buttock, and right shoulder. OWCP noted that aggravation of multiple sclerosis was not accepted.

from November 2003 through January 2004 and May 2006 through December 2017.⁵ SSA noted that “NH entitled to DIB 05/04 through 04/06.”

In a March 26, 2018 letter, OWCP notified appellant that her compensation would be offset by the portion of her SSA age-related retirement benefits attributable to her federal service. It indicated that she would receive net compensation of \$1,524.60 every 28 days effective March 4, 2018.

OWCP received another FERS/SSA dual benefits calculation form from SSA dated June 10, 2019. SSA calculated SSA age-related retirement benefit rates with FERS offset and without a FERS offset from November 2003 through December 2018. However, beginning January 2004 the SSA rate without FERS was different from the dual benefits calculation form provided on February 23, 2018.⁶ SSA noted “FROM 04/2004 – 04/2006 THE NH WAS RECEIVING DISABILITY.”

On August 14, 2019 OWCP notified SSA that the February 23, 2018 and June 10, 2019 FERS/SSA dual benefits calculation forms provided different SSA rates without FERS. It requested that SSA clarify the correct SSA rates without FERS for the period November 2003 through December 2018.

OWCP received a January 22, 2020 revised FERS/SSA dual benefits calculation form from SSA. SSA calculated SSA age-related retirement benefit rates with FERS offset and without a FERS offset from November 2003 through April 2004 and May 2006 through December 2019. Beginning November 2003, appellant’s SSA rate with FERS was \$1,309.00 and without FERS was \$968.00. Beginning December 2003, her SSA rate with FERS was \$1,336.00 and without

⁵ Beginning November 2003, the SSA rate with FERS was \$1,309.00 and without FERS was \$968.20. Beginning December 2003, the SSA rate with FERS was \$1,336.50 and without FERS was \$988.50. Beginning January 2004, the SSA rate with FERS was \$1,338.20 and without FERS was \$988.50. Beginning May 2006, the SSA rate with FERS was \$1,659.50 and without FERS was \$1,225.80. Beginning December 2006, the SSA rate with FERS was \$1,714.20 and without FERS was \$1,225.80. Beginning December 2007, the SSA rate with FERS was \$1,753.60 and without FERS was \$1,266.20. Beginning December 2008, the SSA rate with FERS was \$1,855.30 and without FERS was \$1,370.40. Beginning December 2009, the SSA rate with FERS was \$1,855.30 and without FERS was \$1,370.40. Beginning December 2010, the SSA rate with FERS was \$1,855.30 and without FERS was \$1,370.40. Beginning December 2011, the SSA rate with FERS was \$1,922.00 and without FERS was \$1,419.70. Beginning December 2012, the SSA rate with FERS was \$1,954.60 and without FERS was \$1,443.80. Beginning December 2013, the SSA rate with FERS was \$1,983.90 and without FERS was \$1,465.40. Beginning December 2014, the SSA rate with FERS was \$2,017.60 and without FERS was \$1,490.30. Beginning December 2015, the SSA rate with FERS was \$2,017.60 and without FERS was \$1,490.30. Beginning December 2016, the SSA rate with FERS was \$2,023.60 and without FERS was \$1,494.70. Beginning December 2017, the SSA rate with FERS was \$2,064.00 and without FERS was \$1,524.60.

⁶ Beginning January 2004, the SSA rate with FERS was \$1,338.20 and without FERS was \$990.20. Beginning May 2006, the SSA rate with FERS was \$1,659.50 and without FERS was \$1,259.80. Beginning December 2006, the SSA rate with FERS was \$1,714.20 and without FERS was \$1,301.30. Beginning December 2007, the SSA rate with FERS was \$1,753.60 and without FERS was \$1,331.10. Beginning December 2008, the SSA rate with FERS was \$1,855.30 and without FERS was \$1,408.20. Beginning December 2011, the SSA rate with FERS was \$1,922.00 and without FERS was \$1,458.80. Beginning December 2012, the SSA rate with FERS was \$1,954.60 and without FERS was \$1,483.50. Beginning December 2013, the SSA rate with FERS was \$1,983.90 and without FERS was \$1,505.70. Beginning December 2014, the SSA rate with FERS was \$2,017.60 and without FERS was \$1,531.20. Beginning December 2016, the SSA rate with FERS was \$2,023.60 and without FERS was \$1,535.70. Beginning December 2017, the SSA rate with FERS was \$2,064.00 and without FERS was \$1,566.30. Beginning December 2018, the SSA rate with FERS was \$2,121.70 and without FERS was \$1,610.10.

FERS was \$988.00. Beginning January 2004, her SSA rate with FERS was \$1,338.00 and without FERS was \$988.00. Beginning April 2004, her SSA rate with FERS was \$1,338.00 and without FERS was \$988.00. Beginning May 2006, her SSA rate with FERS was \$1,659.50 and without FERS was \$1,193.50. Beginning December 2006, her SSA rate with FERS was \$1,713.50 and without FERS was \$1,232.50. Beginning December 2007, her SSA rate with FERS was \$1,753.40 and without FERS was \$1,260.40. Beginning December 2008, her SSA rate with FERS was \$1,854.40 and without FERS was \$1,333.40. Beginning December 2009, her SSA rate with FERS was \$1,854.50 and without FERS was \$1,333.50. Beginning December 2010, her SSA rate with FERS was \$1,854.50 and without FERS was \$1,333.50. Beginning December 2011, her SSA rate with FERS was \$1,921.90 and without FERS was \$1,381.90. Beginning December 2012, her SSA rate with FERS was \$1,953.90 and without FERS was \$1,404.90. Beginning December 2013, her SSA rate with FERS was \$1,983.90 and without FERS was \$1,425.90. Beginning December 2014, her SSA rate with FERS was \$2,016.90 and without FERS was \$1,450.90. Beginning December 2015, her SSA rate with FERS was \$2,016.90 and without FERS was \$1,450.90. Beginning December 2016, her SSA rate with FERS was \$2,023.00 and without FERS was \$1,455.00. Beginning December 2017, her SSA rate with FERS was \$2,064.00 and without FERS was \$1,484.00. Beginning December 2018, her SSA rate with FERS was \$2,121.50 and without FERS was \$1,525.50. Beginning December 2019, the SSA rate with FERS was \$2,155.60 and without FERS was \$1,549.60. SSA noted “DIB exclusion 05/2004 – 04/2006.”

In a preliminary overpayment determination dated April 1, 2020, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$77,651.90⁷ because her wage-loss compensation benefits had not been reduced for the period November 1, 2003 through December 1, 2017 by the portion of her SSA benefits that were attributable to her federal service. It determined that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records which support income and expenses. Additionally, OWCP further notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

Accompanying the preliminary overpayment determination was an offset calculation chart, which noted the calculation of appellant’s SSA offset overpayment from November 1, 2003 through November 30, 2006 and May 1, 2006 through March 3, 2018 and computed a total overpayment amount of \$80,121.13. This form indicated: from November 1 through 30, 2003 she received an overpayment in the amount of \$337.25; from December 1 through 31, 2003 she received an overpayment amount of \$355.65; from January 1 through March 30, 2004 she received an overpayment of \$1,038.46; from April 1, 2004 through April 30, 2006 she received an overpayment amount of \$2,469.23; from May 1 through November 30, 2006 she received an overpayment of \$3,287.60; from December 1, 2006 through November 30, 2007 she received an overpayment of \$5,787.86; from December 1, 2007 through November 30, 2008 she received an overpayment of \$5,948.51; from December 1, 2008 through November 30, 2009 she received an overpayment of \$6,269.18; from December 1, 2009 through November 30, 2011 she received an overpayment of \$12,538.35; from December 1, 2011 through November 30, 2012 she received an

⁷ In the conclusion section of the decision OWCP declared that the amount of the overpayment was \$80,121.13.

overpayment of \$6,515.60; from December 1, 2012 through November 30, 2013 she received an overpayment of \$6,606.10; from December 1, 2013 through November 30, 2014 she received an overpayment of \$6,714.40; from December 1, 2014 through November 30, 2016 she received an overpayment of \$13,639.98; from December 1, 2016 through November 30, 2017 she received an overpayment of \$6,834.73; from December 1, 2017 through March 3, 2018 she received an overpayment of \$1,778.24.

By decision dated June 17, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$77,651.90 for the period November 1, 2003 through December 1, 2017, because it failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that appellant had not responded to the preliminary overpayment determination and did not request waiver of recovery of the overpayment. As a result, the overpayment could not be waived because there is no evidence to substantiate that adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁸ OWCP requested that appellant remit payment in full of \$77,651.90.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁹ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.¹⁰

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.¹¹ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA

⁸ OWCP provided a revised FERS offset calculation chart on June 17, 2020. The form provided SSA benefits rates with a FERS offset and without a FERS offset for the period November 1, 2003 through March 30, 2004 and May 1, 2006 through March 3, 2018. The form indicated: from November 1 through 30, 2003 she received an overpayment in the amount of \$337.25; from December 1 through 31, 2003 she received an overpayment amount of \$355.65; from January 1 through March 30, 2004 she received an overpayment of \$1,038.46; from May 1 through November 30, 2006 she received an overpayment of \$3,287.60; from December 1, 2006 through November 30, 2007 she received an overpayment of \$5,787.86; from December 1, 2007 through November 30, 2008 she received an overpayment of \$5,948.51; from December 1, 2008 through November 30, 2009 she received an overpayment of \$6,269.18; from December 1, 2009 through November 30, 2011 she received an overpayment of \$12,538.35; from December 1, 2011 through November 30, 2012 she received an overpayment of \$6,515.60; from December 1, 2012 through November 30, 2013 she received an overpayment of \$6,606.10; from December 1, 2013 through November 30, 2014 she received an overpayment of \$6,714.40; from December 1, 2014 through November 30, 2016 she received an overpayment of \$13,639.98; from December 1, 2016 through November 30, 2017 she received an overpayment of \$6,834.73; from December 1, 2017 through March 3, 2018 she received an overpayment of \$1,778.24.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8116.

¹¹ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

age-related retirement benefits earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, but that the case is not in posture for decision regarding the period and the amount of the overpayment.

OWCP paid appellant wage-loss compensation for total disability following her injury. It subsequently paid her wage-loss compensation for partial disability based on her loss of wage-earning capacity effective March 4, 1997 and beginning June 16, 2002. Appellant initially received SSA age-related retirement benefits on November 1, 2003. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹³ The information provided by SSA indicated that a portion of appellant's age-related retirement benefits were attributable to her federal service. As OWCP neglected to offset her FECA benefits she received an overpayment of wage-loss compensation.¹⁴ Therefore, fact of overpayment is established.¹⁵

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. SSA provided appellant's SSA rate with FERS and without FERS beginning November 1, 2003 through December 1, 2017. After calculating the amount that it should have offset for each relevant period based on the SSA worksheet and adding these amounts together, OWCP concluded that she had received an overpayment of \$77,651.90. It then noted in the accompanying FERS offset calculation chart, however, without explanation that the overpayment period was from November 1, 2003 through March 3, 2018. In both the preliminary overpayment determination of April 1, 2020 and final overpayment decision dated June 17, 2020 OWCP noted in the overpayment memorandum section of the decision an overpayment period of November 1, 2003 through December 1, 2017, but in the computation of overpayment section of the decision noted an overpayment period from November 1, 2003 through March 3, 2018. OWCP did not, however, address the issue of why OWCP had determined that the overpayment period ended on December 1, 2017 rather than March 3, 2018. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹⁶ The Board will, therefore, remand the case for OWCP to further explain its calculation of the amount of the overpayment.

On remand OWCP shall determine the exact period and amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an

¹² FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹³ *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹⁴ *Id.*

¹⁵ *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

¹⁶ *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *O.R.*, 59 ECAB 432 (2008).

overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information.¹⁷ After this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment of wage-loss compensation for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board further finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ See *L.K.*, Docket No. 20-0416 (issued November 12, 2020).

¹⁸ In light of the Board's disposition regarding the period and amount of the overpayment, the issues of waiver of recovery of the overpayment are rendered moot.